Paul Tsakok & Associates v Engineering & Marine Services (Pte) Ltd

HIGH COURT (SINGAPORE) — SUIT NO 4677 OF 1982
THEAN J
10 OCTOBER 1990

Contract — Implied terms — Architect engaged on terms provided in Singapore Institute of Architects' Conditions of Engagement — Whether term can be implied that plaintiff was obliged to ensure that cost of building would come within budget or estimated cost

Contract — Consideration — Whether consideration had wholly failed — Architect's services terminated — Architect's final plans and specifications approved by defendants — Building eventually erected based substantially on plans drawn by architect

Contract — Architect's fees — Architect engaged on terms provided in Singapore Institute of Architects' Conditions of Engagement — Construction of para 4 of conditions — 'Estimated costs of such works'

The plaintiff is a firm of architects and brought this action against the defendants claiming for fees due to them as the architects for the defendants in respect of a project. The plaintiff was engaged by the defendants on the terms as provided in the Singapore Institute of Architects' Conditions of Engagement ('the conditions'). After the presentation of preliminary drawings and some amendments thereafter, the plaintiff prepared and completed the layout and building plans which were sent to the defendants for approval, which approval was given. After approval from the relevant authorities, piling work was carried out. Subsequently, tenders for the construction of the building were invited. However, the defendants suspended the invitation for tenders on the ground that the cost of the building then estimated would exceed the original cost of approximately $1.5m. The defendants alleged that the plaintiff had exceeded the budget allowed for and requested that all building drawings be rectified or amended to meet the budgeted amount. The plaintiff refuted this and demanded payment of the fees due with a provisional bill of $48,000. In response, the defendants terminated the plaintiff's services. There was thereafter a dispute as to the amount of fees due to the plaintiff. The defendants engaged another party to undertake the project, and the building, which was eventually completed at a total cost of $1,561,662.22, was in all material respects similar to that the plaintiff had designed.

Held, allowing the plaintiff's claim in part:

(1) It was never in the contemplation of the plaintiff that he would or could ensure that the cost of the building would come within the budgeted or estimated amount of $1.5m. The defendants' director had also not truly expected that the plaintiff would be in a position to ensure that the cost of the building would not exceed the amount contemplated. He knew that it is not within the province of an architect to quantify the cost of a building with any accuracy and that it is not practicable to expect an architect to ensure that the cost would not exceed the amount budgeted for. It was therefore not a term of the contract that the plaintiff was to ensure that the cost would not exceed the amount of $1.5m.

(2) The final plans and specifications as drawn up by the plaintiff were approved by the defendants, and the plaintiff had obtained approval from the relevant authorities on the defendants' behalf. Piling work had been completed, and presumably the plaintiff had done some work in relation to the piling carried out. The building eventually erected on the site was substantially based on the plans drawn by the plaintiff. In these circumstances, it cannot be argued that the services rendered by the plaintiff were not in conformity with the defendants' instructions and that the consideration for the part payment of fees amounting to $25,000 had wholly failed.

(3) Paragraph 9(ii) of the conditions is not applicable because the work was not abandoned. The service of the plaintiff was terminated because at that time there was absent the necessary working and workable relationship between the plaintiff and the defendants. The relevant stage applicable for determining the 'estimated costs' of the works for determining the fees would be the time when the plaintiff had prepared all the working drawings, specification and other particulars necessary for the purpose of obtaining tenders. The 'estimated cost' for the purpose of applying para 4(iv) of the conditions is $1.5m as this was the amount both the plaintiff and the defendants had in contemplation at the material time.

(4) The action could have been avoided if both parties had acted sensibly. In the circumstances, the defendants were ordered to pay the plaintiff only half the costs.

Teo Guan Teck for the plaintiff.
Goh Yew Hock for the defendants.

Cur Adv Vult

Thean J: The plaintiffs are a firm of architects and brought this action against the defendants claiming for fees due to them as the architects for the defendants in respect of a project developed by the latter on their property, lot A6827 at Tuas.

The defendants first approached one Paul Tsakok of the plaintiff firm in early June 1981 or thereabouts with the view to appointing him as the architect. As Paul Tsakok was at all material times the sole proprietor of his firm I shall refer to him as 'the plaintiff'. At one of the early meetings between the plaintiff and one Johnny Lee ('Lee'), a director of the defendants, the plaintiff was provided with two rough sketches of a proposed building which the defendants had in mind; the proposed building as shown consisted mainly of a workshop and an adjoining two-storey administration office. Based on the instructions given, the plaintiff proceeded and prepared a sketch drawing which was shown to and discussed with Lee at a subsequent meeting on or about 10 June 1981.

At or about that time the plaintiff also wrote to the defendants setting out the terms of his appointment by the defendants and seeking the defendants' confirmation of their agreement to those terms. The defendants on 19 June 1981 confirmed their acceptance of the terms after having obtained clarification from the plaintiff as to the apportionment of the fees between him and the mechanical and electrical engineer. The formal agreement between them was made on 19 June 1981 ('the contract'), and the material terms are as follows:

As discussed, our fees (ie the plaintiff's fees) for full architectural services shall be 7½% of the final cost of the project inclusive of building works, culverts, drains, landscaping and mechanical and electrical installations for the buildings.

The terms of engagement shall be in accordance with the Singapore Institute of Architects Conditions of Engagement, a copy of which is enclosed for your reference.

It was also agreed that of the 7½%, the architectural fees would be 6% and the fees for the mechanical and electrical engineer would be 1½%, and that the plaintiff would be responsible for payment of the fees to the mechanical and electrical engineer.

On or about 19 June 1981, there was a further meeting between the plaintiff and Lee at which the plaintiff submitted a preliminary drawing of the proposed building and also an estimate of the cost of the building. The estimated cost was $1,460,000.76, excluding the cost of piling, professional fees, fees for the authorities and future increases in the price of labour and materials; that estimate was prepared by a contractor instructed by the plaintiff. On the preliminary drawing Lee suggeested that a section of the office building be eliminated and, in lieu thereof, an additional storey to the building be constructed, thereby making it a three-storey office building. After that meeting, the plaintiff prepared and completed the layout and building plans which were sent to the defendants for approval, and they were approved by the defendants on or about 15 July 1981. Thereafter the plans were submitted to Jurong Town Corporation, which approved them on 19 August 1981. After that, the plaintiff submitted the plans to the competent authority for written permission for the development of the project and the permission was granted on 29 December 1981. In March 1982 tenders for piling work were invited and an award of the piling contract was made in April 1982. Piling then proceeded and was later completed. Subsequently, tenders for the construction of the building were invited and the closing date of the tenders was 16 July 1982. However, on or about 12 July 1982, the defendants suspended the invitation for tenders on the ground that the cost of the buiding then estimated would far exceed the original cost of approximately $1.5m.

On 16 July 1982, the defendants wrote to the plaintiff stating, among other things, the following:

You will recall from our first meeting when we appointed you as architect for this project, we had clearly informed you that we propose to have a simple workshop/office building costing approximately $1.5m inclusive of piling, M & E, culvert, building and etc with the exception of slipways which we definitely would not be building until later stage. This was agreed by you or even the consulting engineers where our fees of approximately $1m is based upon.

Upon obtaining the complete set of building documents from you, these tender documents were presented to the company's board of directors for study and consideration. To the surprise of the board, the building you recommended should easily double our budgeted amount for this building. Therefore, this tender would definitely be cancelled unless you guarantee that the tender sum would not exceed $1.2m excluding only the M & E and piling tenders.

However, in view of your over implementations on this building, the board considers that all your building drawings be rectified or amended to meet our budgeted amount. We trust you will look into this matter carefully and in fact you should be aware of this as it is no use for you to over cost the building when we cannot overcome this financial situation.

On 20 July 1982, the plaintiff replied to the defendants' letter refuting the allegations made by the defendants. The letter ended with a demand by the plaintiff for payment of the fees then due, and he enclosed a provisional bill for payment of the sum of $48,000 computed as follows:

$\frac{2}{3} \times \frac{7.5}{100} \times \$1,460,000$	73,000
Less previous payment	25,000
Amount due	48,000

In response, the defendants by their letter dated 23 July 1982, among other things, terminated the service of the plaintiff as the architect with immediate effect and offered to pay his professional charges in the sum of $39,820.26 computed on the basis of 40% of 7½% of $1,327,342. This proposal was rejected. The plaintiff instructed a quantity surveyor, WT Partnership, to prepare a bill of quantities showing the estimated cost of the building on the basis of the tender drawings and specifications, and the estimated cost so prepared by the quantity surveyor was $2,985,314.54. On that estimate the plaintiff made out a bill for the balance of the fee amounting to $124,265.72 and also a bill for $7,849.44 for disbursements incurred, thus making a total sum of $132,115.16. The defendants, however, refused to pay this amount.

In the meanwhile, after the termination of the plaintiff's service, the defendants engaged one Ng Say Hock, a consulting engineer, to undertake the project. According to Lee, Ng Say Hock had to start afresh, as there were difficulties in obtaining a release of the plans and papers from the plaintiff. Ng Say Hock made fresh applications to the planning and building authorities and obtained their approvals for the construction of the building. It appears, however, that the plans drawn by him were substantially based on those prepared by the plaintiff with necessary modifications. Eventually, the building was completed at a total cost of $1,561,662.22,

and the building so completed was, in all material respects, similar to that the plaintiff had designed.

On 28 October 1982, the plaintiff took out a writ against the defendants claiming the sum of $132,115.16. In the statement of claim the plaintiff first claimed the amount of $132,115.16 as the liquidated amount due, and in the alternative claimed 'such charges as the defendants are liable to the plaintiff under the terms of the Singapore Institute of Architects Conditions of Engagement to be assessed'. The defence of the defendants is this. First, they denied that the plaintiff had performed all or any of the works required of them as architect of the defendants. Next, they pleaded as follows, and it is best to set out the following paragraphs of their defence verbatim:

> (4) The defendants say that at the time of appointment of the plaintiff as architects of the defendants, the defendants had specificially stipulated their development requirements to be of a simple single-storey workshop cum three-storey office building and the project costs must be within their budget of $1.5m.
> (5) The defendants suspended all tenders on 12 July 1982, upon discovering that according to the drawings and specifications prepared by the plaintiff the costs were greatly in excess of their budget.
> (6) Under the circumstances, the defendants terminated the services of the plaintiff as the services rendered by the plaintiff are not in conformity with the defendants' instructions.

Accordingly, the defendants denied that the plaintiff was entitled to the sum of $132,115.16 or to any charges as claimed 'as the services rendered were not in conformity with the defendants' instructions'. The defendants then counterclaimed for the refund by the plaintiff of the sum of $25,000 paid to him by the defendants on the ground that the consideration therefor had wholly failed, ie the services rendered were not in conformity with their instructions. On the basis of these pleadings, the issues raised are as follows:

(i) whether it was a term of the contract that the project for which the plaintiff was engaged as an architect was a simple single-storey workshop and a three-storey office building and that the plaintiff was under an obligation to ensure that the cost of the project would fall wthin the budget of $1.5m;
(ii) whether the services rendered by the plaintiff were in conformity with the defendants' instructions;
(iii) whether the consideration for payment of the sum of $25,000 to the plaintiff had wholly failed; and
(iv) what fee the plaintiff is entitled to be paid for the services he had rendered.

These are mainly issues of facts, and I now turn to examine the evidence before me.

It is clear that at the initial stage, prior to formal appointment of the plaintiff as the architect, Lee gave to the plaintiff two sketches indicating roughly the defendants' requirements. On the basis of these sketches, the plaintiff at the next meeting with Lee produced a preliminary sketch, and they had a discussion thereon. Following that discussion, the plaintiff prepared a preliminary drawing which he showed to Lee. The latter decided that the administration office should have three storeys instead of two, and that suggestion of Lee was incorporated. Subsequently, architectural drawings were prepared and approved by the defendants, and these were submitted to the authorities for approvals, and the necessary approvals were obtained. Whatever might be the requirements specifically stipulated by the defendants initially the configurations of the building were clearly those as shown in the plans approved by the defendants and submitted to the authorities. There was therefore no dispute as to the building finally required and approved by the defendants.

The dispute really centred on the question whether it was a term of the contract that the cost of the building as designed or to be designed by the plaintiff as an architect must come within the defendants' budget of $1.5m in the sense that he was under an obligation to ensure that the actual cost would not exceed the amount. This in turn raises two points for consideration: first, whether the parties at the material time had in contemplation a budget for or at least an estimated cost of the building, and, secondly, the plaintiff's obligation in relation to such budget or estimated cost. According to Lee, at the meeting with the plaintiff, when Lee showed to the plaintiff the two sketches, he indicated to the plaintiff that the defendants had a limited budget for the project; that the budget was $1.5m and that the plaintiff must ensure that the cost of the building would fall within the budget. This was denied by the plaintiff; he said that at the initial meeting there was no mention of any budget for the building and it was only at the subsequent meeting, when he showed to Lee the sketches, that the latter asked for an estimated cost of the building.

I think that, in all probability, at the initial stage and certainly at the meeting when Lee provided the plaintiff with the sketches of the proposed building, Lee must have indicated to the plaintiff a budget for the building which the defendants had in mind. It is inconceivable that a building owner would proceed with the development of a building without some idea as to the cost he would be prepared to bear. I accept the evidence of Lee that he had told the plaintiff that the defendants had a budget of $1.5m for the proposed building. This must be one of the reasons, if not the only reason, why the plaintiff subsequently at a meeting with Lee on or about 19 June 1981 submitted to the latter an estimate of the cost of the building, which was $1.46m. I think that both parties understood that that was a very rough estimate, and that both had in contemplation a building

costing about $1.5m. It is significant that in the application to the authorities submitted by the plaintiff on behalf of the defendants, the plaintiff gave an estimated cost in the region of $1.5m. However, subsequently, when the final plans and specifications were drawn up by the plaintiff and approved by the authorities, both parties appeared to have lost sight of the original budget or estimate of $1.5m. This position continued just before the close of the tenders, when the defendants suddenly realized that the project would cost far more than the original budget or estimate which they had in mind. Both parties then over-reacted to the predicament, as can be seen from their exchange of correspondence culminating in the defendants terminating the service of the plaintiff as the architect.

I next turn to consider the plaintiff's obligation with reference to this budget or estimated cost which the parties had in mind. It was certainly not an express term of the contract that the plaintiff was obliged to ensure that the cost of the building would come within the budget or the estimated cost. There is no evidence before me that the parties, ie the plaintiff and Lee, had verbally agreed to such a term. The question then is whether such a term can in the circumstances be implied. As I have held, at the material time, when the building plans were drawn up, the parties had in mind a building for construction at the estimated cost of $1.5m. However, I do not think it was ever in the contemplation of the plaintiff that he would or could ensure that the cost of the building would come within the budgeted or estimated amount of $1.5m. There was no evidence before me that he had in any way given the impression that he gave any such assurance. Costing is not within his area of expertise. As for Lee, I do not think that he truly expected that the plaintiff would be in a position to ensure that the cost of the building would not exceed the amount contemplated. Lee himself is a businessman, and his company is engaged in ship repair and steel fabrication and I do not think that he is unfamiliar with questions of estimates and costs of construction. Further, I think he knows that it is not within the province of an architect to quantify the cost of a building with any accuracy and that it is not practicable to expect an architect to ensure that the cost would not exceed that amount budgeted for. I therefore come to the conclusion that it was not a term of the contract that the plaintiff was to ensure that the cost would not exceed the amount of $1.5m.

The second and third issues are very closely linked and may be considered together. The plaintiff was engaged by the defendants as an architect and in that capacity he had designed and drawn up plans and specifications for the building as required by the defendants. The final plans and specifications as drawn by him were approved by the defendants, and the plaintiff had on their behalf obtained approval from Jurong Town Corporation and approvals from planning and building authorities. Piling works on the site of lot A6827 had also been completed, and presumably the plaintiff had done some work in relation to the piling carried out. The building eventually erected on the site was substantially based on the plans drawn by the plaintiff. In the circumstances, I do not see how it can be argued that the services rendered by the plaintiff were not in conformity with the defendants' instructions and that the consideration for the part payment of fees amounting to $25,000 had wholly failed.

I now turn to the last issue: the amount of fees the plaintiff is entitled to receive from the defendants. The plaintiff was engaged by the defendants on the terms as provided in the Singapore Institute of Architects' Conditions of Engagement ('the conditions'). Paragraph 4 of the conditions, in so far as relevant, provides as follows:

> The architect is entitled to payment in stages as follows and in cases where the architect performs partial services for any reason, including the abandonment, deferment, substitution or omission of any period and/or works, or part thereof, or if the services of the architect are terminated, the fees in respect of the services performed shall be as follows:
>
> (iv) For taking client's instructions, preparing sketch designs, making approximate estimate of cost by cubic measurement or otherwise, and preparing working drawings, specification, or such other particulars as may be necessary for the preparation of bills of quantities by an independent quantity surveyor, or for the purpose of obtaining tenders, the fee shall be two-thirds of the appropriate percentage due on the estimated costs of such works.

It is clear that para 4(iv) of the conditions applies in assessing the amount of fees to which the plaintiff is entitled. The difficulty in applying this provision lies in the determination of 'the estimated costs of such works' as provided therein. Counsel for the plaintiff invoked para 9 of the conditions, which provides:

> (i) For the purpose of calculating the percentage fees the cost of the works shall include all builders work as set out in the contract and all specialist or sub-contractors work such as electrical services, lifts, airconditioning and the like. Specialists work may however be subject to a reduction in the scale of fees as set out in cl (G) conditions of engagement but in no case shall the total fees payable be reduced by more than one-sixth.
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> (ii) Where work is abandoned the cost of work to be calculated shall be based on the lowest tender received including all specialist work subject to tenders being received before the work is abandoned. In the case where tenders have not been received the architect's approximate estimate of cost shall be used. In the event of disagreement, an estimate of the approximate cost shall be prepared by an independent quantity surveyor in which case the quantity surveyor's fees for preparing his estimate shall be paid direct by the client to the quantity surveyor.

Counsel contended that on the basis of para 9(ii) the approximate cost as quantified by the quantity surveyor, WT Partnership, should be accepted. That estimate was made at the request of the plaintiff and on the basis of the drawings and specifications prepared by the plaintiff for the tenders. I am unable to accept this contention. Paragraph 9(ii) of the conditions does not apply here, as the work, ie the construction of the workshop and the three-storey office building of the defendants, was not abandoned. On the contrary, the defendants proceeded ahead with the construction and completion of the building. The service of the plaintiff as the architect was terminated not because the defendants had abandoned the work, but because at that time there was absent the necessary working and workable relationship between the plaintiff as the architect and the defendants as the clients. It seems to me that with the acrimonious letters in exchange between them there was no way in which the plaintiff could continue to discharge his duty as an architect for the defendants.

I revert to the question as to what is the 'estimated costs' of the works for the purpose of determining the fees under para 4(iv) of the conditions. It seems to me that the relevant stage applicable for the purpose would be the time when the plaintiff had prepared all the working drawings, specifications and other particulars necessary for the purpose of obtaining tenders. If at that stage the plaintiff had to make out a bill to the defendants, what would be 'the estimated costs' of the works on which he would or could calculate the amount of his fees? In this connection, it is necessary to examine what were the 'estimated costs' he had adopted in the past for various purposes. At the early stage when he had prepared the preliminary drawings of the building and showed them to Lee he furnished an estimate of $1.46m which was prepared by a contractor instructed by him. That estimate could no longer stand, as at that meeting Lee instructed that another storey be added to the office block, thus making it a three-storey building and increasing the costs. Subsequently, in the application to the Development Control Division dated 17 July 1981 he inserted the amount of $1.5m as the estimated cost of construction. However, in the application to the Building Control Division dated 1 March 1982 the amount of estimated cost of construction was stated to be $1.46m. I think that $1.46m would not be a fair estimate of the cost for the purpose of applying para 4(iv) of the conditions: I therefore decide to adopt $1.5m as the estimated cost. That was the amount both the plaintiff and the defendants had in contemplation at the material time. I therefore determine the fees payable to the plaintiff on the termination of his engagement by the defendants as follows:

(a) Under para 4(iv) —	
$\frac{2}{3}$ of 7.5% of $1.5m	$75,000
Less previous payment	$25,000
	$50,000
(b) Disbursements incurred	$7,849.99
	$57,849.44

Accordingly, there will be judgment for the plaintiff in the sum of $57,849.44 with interest at 6% pa from the date of issue of the writ to date hereof. As for the counterclaim of the defendants, it has no merit whatsoever and is dismissed.

I now turn to the question of costs. This action could have been avoided if both parties had acted and behaved sensibly. First the defendants upon discovering that the cost of the building would far exceed the amount they had budgeted could have awaited the receipt of the tenders, called the plaintiff for a discussion and carried out a cost trimming exercise. Instead, they over-reacted, took on an aggressive stance and wrote to the plaintiff blaming him for the problem that had arisen. Secondly, the plaintiff on receipt of the defendants' letter also over-reacted — presumably out of professional pride — and in turn took on a combative stance and responded to that letter in an unnecessarily acrimonious way. Finally, in framing and representing his claim for fees, the plaintiff adopted an erroneous estimate and submitted an exaggerated claim which made it impossible for an amicable resolution of the dispute. In the circumstances, I am not disposed to award to the plaintiff the entire cost of these proceedings. I therefore order the defendants to pay to the plaintiff only half the costs.

Order accordingly.

Solicitors: *Winston Chen & Co; Goh Yew Hock & Co.*

Reported by *Kevin Mathews*